

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. 1026/2/3/04

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

2nd August, 2004

Before:

SIR CHRISTOPHER BELLAMY (President)
PROFESSOR JOHN PICKERING
MS PATRICIA QUIGLEY

BETWEEN:

WANADOO (UK) PLC
(formerly FREESERVE.COM PLC)

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Keith Jones (of Messrs Baker & McKenzie) appeared for the Applicant

Mr Richard Fowler QC and Mr Meredith Pickford (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr Gerald Barling QC (instructed by the Head of Competition and Public Law, BT Retail) appeared for the Intervener.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. The first matter we have to deal with
2 is a possible application, I gather, for these proceedings to be held in camera – is that the
3 case, or not? Who would like to address us on that first – Mr. Fowler?

4 MR. FOWLER: The position on that, Sir, is this that the Board of OFCOM has taken a decision
5 as to its future course of action and OFCOM is on course to produce the resulting
6 documentation on that by the end of August, within the timetable discussed at the last CMC.
7 If you are happy with the assurance that that is indeed the position ----

8 THE PRESIDENT: Yes.

9 MR. FOWLER: --then there is no need for an application to go into camera. If you want to know
10 what the decision is that the Board has taken, then we would support BT's request that that
11 be dealt within camera.

12 THE PRESIDENT: On what basis?

13 MR. FOWLER: On the basis that it is not normal for OFCOM to announce in advance the steps
14 in its proceedings, and such an announcement would be price sensitive.

15 THE PRESIDENT: If it is price sensitive should it not be announced as soon as possible?

16 MR. FOWLER: It would in the normal way be announced when the documentation was
17 published. It is the fact that, through this proceeding, that is not going to take place until the
18 end of this month that gives rise to this problem.

19 THE PRESIDENT: Is it not slightly dangerous to be sitting on price sensitive information for a
20 month?

21 MR. FOWLER: That is normal within this sort of context within the normal decision making
22 process within OFCOM.

23 THE PRESIDENT: Yes, I see. You support this, do you, Mr. Barling? What is your position?

24 MR. BARLING: Sir, we can see the sense of this. I suppose we ought to reserve slightly,
25 (depending to what extent the future conduct of this Appeal has to be the subject of
26 discussion following on from this) as to whether issues might then arise. But subject to that
27 it does seem that Mr. Fowler's suggestion would dispose of the need to worry about
28 whether it was in camera. We would therefore support Mr. Fowler in the suggestion he has
29 just made.

30 The only reason this issue has arisen is because of the slightly unusual position in
31 relation to this appeal. Normally OFCOM would be free to reach its decision within its
32 appropriate time frame without worrying about this. So for those reasons we would submit
33 that this would be a perfectly appropriate approach.

1 THE PRESIDENT: Yes. You are not though suggesting, are you, Mr. Fowler, that if we went
2 into camera we would exclude Freeserve from the proceedings?

3 MR. FOWLER: No, Sir, but we would ask for directions as to confidentiality of what happened
4 in camera.

5 THE PRESIDENT: Let us see what Freeserve has to say. Yes, Mr. Jones?

6 MR. JONES: Wanadoo UK ----

7 THE PRESIDENT: I am sorry, I should have called you “Wanadoo”, forgive me.

8 MR. JONES: That is all right. Wanadoo UK is of the view that if the Tribunal is happy with the
9 announcement as stated by Mr. Fowler then that is one matter. If the concern is that it is
10 merely a price sensitive discussion that would take place in this Tribunal today Wanadoo
11 UK is of the view that BT could make an announcement to the market immediately
12 afterwards, i.e. before 7.30 a.m. tomorrow morning and therefore dispose of the matter.
13 The Markets, I believe, close at 4 p.m. today, there seems little scope for any price sensitive
14 information being utilised in a manner inappropriately.

15 THE PRESIDENT: Yes, thank you.

16 MR. BARLING: Can I just make a point on that?

17 THE PRESIDENT: Yes.

18 MR. BARLING: It does seem to us that whatever OFCOM’s decision is the problem with what
19 has just been suggested by Wanadoo is that, almost by definition, BT and no one else will
20 know the scope of it, will know none of the detail, none of the reasons – whether it be non-
21 infringement or a proposal to issue a Rule 14 Notice, so we will be in a very ambivalent
22 position, we will be in the dark as to any detail and if for no other reason in our submission
23 that is perhaps further reason for supporting ----

24 THE PRESIDENT: You do not know yet what it is we are talking about, what OFCOM’s
25 position is?

26 MR. BARLING: We would not know any details. Whichever way the decision was that OFCOM
27 may have an intention to do we would have none of the reasoning or detail behind it.

28 THE PRESIDENT: As at this moment you have no detail as to what the decision of the Board of
29 OFCOM is?

30 MR. BARLING: No detail.

31 THE PRESIDENT: But you know what it is?

32 MR. BARLING: We do.

33 THE PRESIDENT: (After a pause) The Tribunal will rise for a moment.

34 (Short break)

1 THE PRESIDENT: As a precautionary measure at this stage the Tribunal will continue with this
2 CMC in camera. I therefore need to ascertain whether we have any members of the public
3 present who are not associated with any of the parties to the case or otherwise entitled to be
4 here. It looks as though we are *de facto* in camera anyway, but the consequence of our
5 ruling is that from now on we would not publish the transcript, at least until further order.

6 MR. JONES: May I just mention one matter?

7 THE PRESIDENT: Yes, Mr. Jones.

8 MR. JONES: One representative of Wanadoo is an intern for the Summer, and so I thought I
9 would mention that, I do not know if you would want him to leave.

10 THE PRESIDENT: You mean you are otherwise represented by lawyers, are you?

11 MR. JONES: Otherwise it is lawyers and Mr. Sam Persoff, who is the in-house for Wanadoo UK,
12 but there is one person working for Wanadoo UK, who is an intern for the Summer.

13 THE PRESIDENT: Is he legally qualified in some way?

14 MR. JONES: He is wanting to be a lawyer but not yet.

15 THE PRESIDENT: Yes. Is there any objection to this gentleman remaining? [No objections]
16 Apparently not. Thank you for mentioning that, Mr. Jones.

17 (The hearing continued In Camera – see separate transcript)